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No. (1)
09-40

Supreme Court, U.S.
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In The
Supreme Court of the United States

ILLINOIS INVESTMENT TRUST NO. 92-7163,

Petitioner,

v.

AMERICAN GRADING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the lower courts err in finding that Resource Technology Corporation ("RTC") was required under its agreement with American Grading Company (the "Appellee") and the July 11, 2002 order to make a $100,000 advance royalty payment to the Appellee on January 1, 2006?

B. Did the lower courts err in finding that the Appellee properly terminated the agreement due to RTC's failure to make a $100,000 advance royalty payment to the Appellee on January 1, 2006?

C. Did the lower courts err in failing to find that the Appellee's refusal to allow RTC access to the McCook Landfill excused RTC from performing under the agreement?

D. Did the lower courts err in failing to rule that the February 8, 2007 trial order rendered the Appellee's notice of termination of the agreement ineffective?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The petitioner here and appellant below is Illinois Investment Trust No. 92-7163.

The respondent here and appellee below is American Grading Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the petitioner states as follows:

Petitioner Illinois Investment Trust No. 92-7163 has no parent corporation. No publicly held company owns any of the stock of the petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

A. Factual Background 2

B. Proceedings Below 4

REASONS FOR GRANTING THE PETITION 5

I. The advance royalty deposit did not provide a valid basis for termination 5

A. The District Court misapplied the advance royalty provision 6

B. The Appellee waived a basis for termination 8

C. In any event, nonpayment of the advance royalty was not a material breach 9

D. The Bankruptcy Court erred in permitting the Appellee to terminate the Agreement 11

II. The Appellee prevented RTC's performance under the Agreement 11

CONCLUSION 19

APPENDIX

Decision and Opinion of
The United States Court of Appeals for
the Seventh Circuit
entered April 8, 2009 ..... 1a

Order of
The United States District Court of
The Northern District of Illinois
Re: Entering Judgment Affirming
Decision of Bankruptcy Court
entered November 19, 2007 ..... 14a

Memorandum Opinion and Order
entered November 19, 2007 ..... 15a

Judgment in a Civil Case of
The United States District Court
Northern District of Illinois
entered November 19, 2007 .....29a

Order of
The United States Bankruptcy Court for
The Northern District of Illinois
Re: Establishing the Termination of
McCook Lease
entered April 17, 2007 .....30a

Order of
The United States Bankruptcy Court for
The Northern District of Illinois
Re: Authorizing Debtor's Assumption of
Its Executory Landfill Gas Collection and
Conversion Agreement With
American Grading Company
entered July 11, 2002 .....32a

Excerpts of Transcript of Trial Proceedings
Before The Honorable Eugene R. Wedoff
on April 17, 2007.....39a

Excerpts of Transcript of Trial Proceedings
Before The Honorable Eugene R. Wedoff
on April 5, 2007.....44a

Excerpts of Transcript of Trial Proceedings
Before The Honorable Eugene R. Wedoff
on April 4, 2007.....48a

Appellee's Third Motion *In Limine* to
Bar Testimony, Evidence or Argument
Relating to the Purported Denial of
Access to the Debtor's Former Employees
entered March 29, 2007.....56a

TABLE OF AUTHORITIES

Page(s)

CASES

Barrows v. Maco, Inc.,
94 Ill. App. 3d 959,
419 N.E.2d 634 (1st Dist. 1981).....11

Galesburg Clinic Ass'n v. West,
302 Ill. App. 3d 1016,
706 N.E.2d 1035 (3d Dist. 1999)..... 10

Mann v. Mann,
283 Ill. App. 3d 915,
671 N.E.2d 73 (3d Dist. 1996).....9, 10

Marriage of Corkey,
269 Ill. App. 3d 392,
645 N.E.2d 1384 (2d Dist. 1995).....17, 18

Pacini v. Regopoulos,
281 Ill. App. 3d 274,
665 N.E.2d 493 (1st Dist. 1993).....10

Soo Line R. Co. v.
Escanaba & Lake Superior R. Co.,
840 F.2d 546 (7th Cir. 1988) 8

Terminal Freezers, Inc. v.
Roberts Frozen Foods, Inc.,
41 Ill. App. 3d 981,
354 N.E.2d 904 (3d Dist. 1976) 9

STATUTES

11 U.S.C. § 101, *et seq.* 1

11 U.S.C. § 365(b) 11

28 U.S.C. § 1254(1) 1

Bankruptcy Code § 365(f) 3

Uniform Commercial Code § 9-403(b) 8

OTHER AUTHORITIES

4 Corbin, A.,
Corbin on Contracts § 946 10

18 W. Jaeger, Williston on Contracts
§ 1952 (3d ed. 1978) 18

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 562 F.3d 824 and is reprinted in the petitioner's Appendix.[1] The United States District Court for the Northern District of Illinois is reported at 2007 WL 4162806 and is reprinted in the petitioner's Appendix.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on April 8, 2009. This Court has jurisdiction pursuant 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Bankruptcy Code, codified at 11 U.S.C. § 101, *et seq*.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Seventh Circuit Court of Appeals affirming a decision of the United States District Court for the Northern District of Illinois, which in turn affirmed a decision of the United States Bankruptcy Court for the Northern District of Illinois. The Bankruptcy Court entered an order denying, in part, the motion of Jay A. Steinberg, not individually but as Chapter 7 Trustee (the "Trustee") for the bankruptcy estate of RTC, to assign to the petitioner Illinois Investment

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[1] The petitioner's appendix shall be referred to hereinafter as "Pet. App. ___."

Trust No. 92-7163 (the "Petitioner") an executory contract between RTC and the Appellee.

A. Factual Background

On November 15, 1999, certain creditors of RTC filed an involuntary petition against RTC, thereby initiating case no. 99 B 35434 pending in the United States Bankruptcy Court for the Northern District of Illinois. By order dated July 9, 2002, the Bankruptcy Court authorized RTC to assume an executory contract to which the Appellee was the counterparty, *i.e.*, the Landfill Gas Collection And Conversion Agreement for a landfill in McCook, Illinois (the "McCook Landfill") with the Appellee dated December 27, 1995 (the "Agreement"). (Pet. App. at 32-38a)

On September 27, 2005, the Trustee was appointed. In 2006, Chiplease, Inc., Scattered Corporation and other entities negotiated a settlement agreement with the Trustee, whereby the Trustee sold certain assets and interests to Chiplease and the other settling parties, and various disputes were resolved. As part of the settlement, the Trustee agreed to convey designation rights to RTC's executory contracts and to move the Bankruptcy Court for authority to assume and assign those contracts to Chiplease, Scattered or their designee. On March 16, 2006, the Bankruptcy Court entered an order approving the settlement agreement and the accompanying designation rights agreement.

On April 27, 2006, Chiplease and Scattered designated certain contracts for the Trustee to assume and assign to them or their designee. The Agreement was among those designated contracts. On April 28, 2006, the Trustee filed a motion seeking to assume and assign the Agreement. The Trustee then changed his position and requested that Chiplease and Scattered compel him to act, at which time Chiplease and Scattered filed a motion to compel the Trustee to assume and assign the Agreement, which relief the Bankruptcy Court granted on June 29, 2006. The Trustee subsequently filed a motion to assume and assign the Agreement to Chiplease and Scattered or their designee, *i.e.*, the Petitioner.

In accordance with Section 365(f) of the Bankruptcy Code, the Bankruptcy Court scheduled a trial to determine the amounts necessary to cure RTC's defaults under the Agreement and to determine whether the Petitioner could provide adequate assurance of future performance under the Agreement. The trial was scheduled for April 4, 2007.

On December 22, 2006, the Appellee filed a motion seeking relief from the automatic stay so that it could issue a notice of default to the Trustee relating to the Agreement. The Bankruptcy Court granted the motion on December 28, 2006. On December 29, 2006, the Appellee issued a notice of default to the Trustee, alleging numerous defaults by RTC under the Agreement and demanding cure of said defaults within 30 days. The Appellee sent a second notice of default in January 2007.

On January 31, 2007, the Appellee issued a notice of termination purporting to terminate the Agreement. On February 8, 2007, the Bankruptcy Court entered an order expanding the scope of the trial to include the Appellee's alleged defaults and the termination issue but otherwise specifically preserving the status quo as of December 28, 2006.

At the conclusion of the trial, the Bankruptcy Court denied the Trustee's motion to assume and assign the Agreement to the Petitioner. Initially, the Bankruptcy Court ruled that the Trustee's failure to make a $100,000 advance royalty payment, originally due January 1, 2006, following receipt of the notice of default, made the Appellee's notice of termination effective. The Bankruptcy Court supplemented its ruling eleven days later, finding as additional grounds for termination that the Trustee was not barred from accessing the McCook Landfill after the November 2006 trial as the Petitioner had alleged. Therefore, the Bankruptcy Court found, RTC's estate failed to operate the gas collection system at the McCook Landfill and to comply with the obligations of the Illinois environmental law. (Pet. App. at 30a-31a)

B. Proceedings Below

On the Petitioner's appeal, the District Court affirmed the Bankruptcy Court. (Pet. App. at 14a) Specifically, the District Court found that non-payment of the advance royalty payment under the Agreement was a material breach. (Pet. App. at 19a-21a) The District Court also found that the non-payment of the advance royalty was a

continuing breach, rejecting the Petitioner's argument that the non-payment in January 2006 was irrelevant due to the Appellee's representation that it was only relying on RTC's non-performance after March 26, 2006. (*Id.*) The District Court found that the Appellee's actions in denying the Trustee access to the McCook Landfill did not excuse RTC's performance, that the lack of access did not bar the Trustee from making the royalty payment, that the Trustee could have gained access at any time by seeking court intervention, and that the Trustee had full access to the landfill after the November 2006 trial in which the Bankruptcy Court found the Agreement had been renewed. (Pet. App. at 23a-25a)

On the Petitioner's appeal, the Court of Appeals for the Seventh Circuit affirmed. (Pet. App. at 1a-13a)

REASONS FOR GRANTING THE PETITION

I. The advance royalty deposit did not provide a valid basis for termination.

That no January 1, 2006 advance royalty deposit was made under Agreement was not fatal. This is so because (a) the lower courts misapplied the advance royalty provision; and (b) the Appellee waived the non-payment of the advance royalty as a basis for termination. In any event, the nonpayment of the advance royalty was not a material breach under the Agreement and should not have provided fodder for the Bankruptcy Court to permit the Appellee's termination of the Agreement.

A. The District Court misapplied the advance royalty provision.

Under the Agreement, RTC had the right to collect and sell gas at the McCook Landfill gas-to-energy plant. The Agreement required RTC to make an annual advance royalty deposit to the Appellee and to pay royalties to the Appellee. The July 9, 2002 order of the Bankruptcy Court permitted RTC to assume the Agreement and interpreted the advance royalty provision of the Agreement as follows, in pertinent part:

> the Court having (1) ruled on the Motion for the reasons stated on the record after the conclusion of the Hearing on May 24, 2002, (2) granted the Motion subject to the terms and conditions set forth below and (3) specifically found that (a) under Section 2 of the Agreement, on January 1 of each year of the term of the Agreement, RTC is required to pay to AGC the sum of $100,000 as an advance on royalties due to AGC under the Agreement for that particular calendar year (the "Advance Royalty"), provided, however, that (i) *if the aggregate amount of Royalties due AGC under the Agreement for that particular calendar year is less than the Advance Royalty, then the remaining balance of that particular calendar year's Advance Royalty will be carried over and deemed credited to RTC's Advance Royalty payment due for the following calendar year and* (ii) any balance on an Advance Royalty remaining as of the completion of the term of the Agreement must

> be paid to RTC within 30 days of such completion, provided that no other amounts due to AGC under the Agreement are unpaid, (b) under Section 3(d) of the Agreement, RTC is responsible for 100% of the real property taxes. . . .

(Pet. App. at 32-38a; emphasis added.)

The July 2002 Bankruptcy Court order makes clear that the $100,000 advance royalty is a deposit for future royalties earned, and the "less than" and "deemed credited" language provides RTC with offset rights if the royalties earned in a particular year are less than $100,000. However, as evidenced by trial testimony cited below, the Appellee prevented access to the landfill for approximately 10 months in 2006. To be clear, the Appellee prevented RTC from earning, in round numbers, $50,000 per month for 10 months totaling $500,000, for which RTC should be entitled to offset against future royalties. That revenue amount exceeds the $100,000 advance royalty deposit. Accordingly, the offset provision applies, and no advance royalty deposit is due.[2]

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[2] Even assuming *arguendo* that the $100,000 advance royalty deposit had been made, when no royalties arose during 2006 because of the Appellee's prevention, the Appellee would not have been entitled to pocket the advance royalty.

This offset provision is also supported in statute and in common law. For instance, in connection with assignments, the claim of an account debtor against an assignor may be asserted against an assignee-*i.e.*, setoff-to reduce the amount the account debtor owes. Uniform Commercial Code § 9-403(b). In addition, in Illinois, setoff is permitted where debts are mutual; that is, the debts arise between the same parties and from the same circumstances. *See e.g., Soo Line R. Co. v. Escanaba & Lake Superior R. Co.*, 840 F.2d 546, 551 (7th Cir. 1988).

The lower courts misapplied the advance royalty provision for January 1, 2006 when they looked to 2005 for evidence of future 2006 royalties and refused to apply the offset provision.

B. The Appellee waived a basis for termination.

By the time of the Appellee's first notice of default in December 2006, there were no royalties generated, *supra*, and thus, no basis to terminate for nonpayment. The Appellee admitted as much in its own pleadings. For example, in its third motion *in limine* before the Bankruptcy Court, the Appellee stated, "First, American Grading's termination is based solely upon the Estate's non-performance following March 26, 2006, the date that the Trustee abandoned the operating permit for the McCook facility." (Pet. App. at 58a, ¶ 6; emphasis added.) The Appellee's omission of the missed advance royalty payment was a waiver of this argument as a basis for termination.

However, at the conclusion of the trial, the Bankruptcy Court interpreted the January 1, 2006 advance royalty deposit as a required obligation under the Agreement and then found it to be a proper basis for the Appellee's termination of the Agreement. In Illinois, a trial court should not *sua sponte* revive an argument or claim or defense that a party already has waived. *See e.g. Terminal Freezers, Inc. v. Roberts Frozen Foods, Inc.*, 41 Ill. App. 3d 981, 985, 354 N.E.2d 904, 907 (3d Dist. 1976) (once plaintiff waived statute of frauds as defense, trial court was foreclosed from considering it *sua sponte*, even if evidence suggested evidence of defense).

C. In any event, nonpayment of the advance royalty was not a material breach.

Alternatively, if the Court finds nonpayment of the advance royalty, the Petitioner submits that said nonpayment was not a material breach of the Agreement. It would have been only a technical breach that would not permit the Appellee to terminate the Agreement.

In *Mann v. Mann*, 283 Ill. App. 3d 915, 671 N.E.2d 73 (3d Dist. 1996), the court found that a farm land lessee did not materially breach the terms of his lease by failing to submit annual financial reports to the lessor. Although the lease required the reports to be submitted, the court found that in effect contractual obligations were performed since the lessee maintained his financial records and made the necessary lease payments, and as such the

payment terms of the lease were honored and any breach by the lessee was not material. *Id.*, 283 Ill. App. 3d at 922; 671 N.E.2d at 78.

The test for materiality is "whether the breach is of such a nature and of such importance that, if anticipated in advance, the contract would not have been entered into." *Galesburg Clinic Ass'n v. West*, 302 Ill. App. 3d 1016, 1018, 706 N.E.2d 1035, 1037 (3d Dist. 1999). Failure to pay a royalty advance under the Agreement for a time period during which no royalties were owed is not a type of breach that, if anticipated, would have prevented the Agreement from coming into existence.

Moreover, "[i]f a contractor's failure of performance causes such slight harm that the courts will give no remedy therefore, adopting and applying the maxim de minimis non curat lex, it is proper to say that there has been no breach of duty." *Pacini v. Regopoulos*, 281 Ill. App. 3d 274, 279, 665 N.E.2d 493, 497 (1st Dist. 1993) (quoting (4 Corbin, A., Corbin on Contracts § 946,) at 813). The Appellee's termination of the Agreement in 2007 due to a failure to make a 2006 advance royalty payment, for which no party asserts any royalties would apply, falls under the doctrine of *de minimis non curat lex.* There is no material breach justifying termination of the Agreement.

D. The Bankruptcy Court erred in permitting the Appellee to terminate the Agreement.

That the Bankruptcy Court permitted the Appellee to terminate the Agreement on virtually the eve of trial is difficult to fathom. The trial was scheduled for the purpose of determining defaults to be cured and assignability to the Petitioner. But the Court, in allowing the Appellee to say essentially, "The Agreement is terminated--gotcha!" undermined the Petitioner's position on the eve of trial. In so doing, the Bankruptcy Court also overlooked that the Appellee denied RTC access to the McCook landfill during the very time of the Appellee's notices of default and termination, as described more below.

II. The Appellee prevented RTC's performance under the Agreement.

It is well settled that a party to a contract cannot complain of a failure to perform which he himself has prevented. *See e.g., Barrows v. Maco, Inc.*, 94 Ill. App. 3d 959, 966-68, 419 N.E.2d 634, 639-40 (1st Dist. 1981) (affirming judgment for plaintiff where defendant prevented plaintiff/subcontractor from performing work upon which his commission was contingent).

RTC's bankruptcy estate assumed the Agreement pursuant to 11 U.S.C. § 365(b) and the Bankruptcy Court's July 2, 2002 order. However, a close review of the Trustee's testimony at trial reveals that the Appellee did not permit the Trustee

to access to the landfill on behalf of RTC's estate. Despite the Appellee's arguments to the lower courts, its denial of access occurred prior to the Trustee's March 2006 abandonment of the operating permit and prior to cessation of estate operations, as follows:

> Q: So let me try, Mr. Steinberg, if I can get from you something of a chronology regarding the question of access to the McCook site, beginning with your appointment as trustee and continuing thereafter. You were first appointed September of '05, you had unrestrained access to the site?
>
> A: Correct, Your Honor.
>
> Q: When did that situation change, if at all?
>
> A: The first I can think of definite denial of access was the period of time we are talking about. That would be December of '05, January '06.
>
> Q: Okay. So there is a period of time from December of '06 to January of '06 when you did not have access to the site, the locks were changed and you didn't have a key, right?
>
> A: Until January 6th or so, yes, Your Honor.
>
> Q: Okay. And then in January of '06 you were given a key?
>
> A: Correct.

Q: Did you retain that key?

A: I gave that key to Mr. Chatz.

Q: To who?

A: Mr. Chatz, my lawyer.

Q: Okay.

A: The estate's lawyer.

Q: Now, as far you know, did Mr. Chatz retain that key?

A: Oh, yes.

Q: Still has it now?

A: Yes.

Q: Okay. So through Mr. Chatz at any time you wishes you could have gotten access to the premises?

A: I would say up through January 19th.

Q: Of '06?

A: '06.

Q: What happened on January 19th?

A: At that point I received an email from Mr. Munitz indicating that the contract was terminated and I should return the keys.

Q: But you didn't?

A: I did not.

Q: So you found out that there was a position being asserted by American Grading but you still had physical access to the site?

A: The keys were in Mr. Chatz's possession. We did not give the keys–we did not use the keys. Mr. Chatz had keys, no question.

Q: But you could have used them if you wanted to?

A: Between January 6th and 16 – and the 19th, yes. Afterwards, I wasn't going to go on the site if Mr. Munitz said I want the keys back, because he gave me the keys.

(Pet. App. At 52a-54a)

Additionally, after that time, the Trustee attempted to broker an arrangement for the Trust, as assignee-to-be, to repair a generator at the site, but the Appellee continued to deny access, as the Trustee further testified:

Q: So isn't it true that the estate, the debtor, was not denied access to the McCook site at any point after March of 2006?

A: After March—

Q: That's a yes or no answer.

A: No, that's not correct.

Q: Why is that not correct?

A: Because in December, in an effort to try to address the problems, it was agreed that they would try to go on the site, and then they changed their minds and said you can't go on the site. They meaning American Grading. I had finished operating. There were problems there.

Q: There was agreement with whom?

A: What:

Q: There was an agreement between who?

A: We were in court and the judge said try to work it out, try to get the situation resolved.

Q: So there was agreement between the estate and American Grading?

A: There was agreement between the parties who were in court.

[*Court-interposed instruction omitted.*]

Q: Did you have an agreement with American Grading in December of 2006?

A: I never had any agreement with American Grading. There was an executory contract.

Q: So when you were referring to parties that were in court, were you excluding yourself from that reference to parties?

A: Would you repeat that question.

Q: Were you one of the parties when you were referring to parties who were in court?

A: Yes.

Q: And what was the nature of the agreement that was reached?

A: We were attempting to—we were attempting to have the generators repaired. I believe that is when Run Energy came in. And we were trying to see if we could get them working. The problem was at that point, I believe, American Grading didn't want to let anyone on from RTC, and I was trying, as I often try to do, to broker a deal and try to get it done.

Q: Is this in November of 2005 or November of 2006?

A: '06.

Q: And what matter were-do you recall what matter you were in court on when this came up?

A: It was in response to someone's motion. I can't tell you whose.

Q: And who was trying to get access to the site to fix generators?

A: I believe Mr. Connolly and Mr. Fortelka.
Q: So that was not you who was trying to get access to the site—

A: Not me. Like I said, I was a volunteer to try to assist the parties in getting the site worked on.

(Pet. App. at 49a-52a)

Indeed, the Appellee made performance under the Agreement impossible. In *Marriage of Corkey*, 269 Ill. App. 3d 392, 645 N.E.2d 1384 (2d Dist. 1995), the court explained the doctrine of impossibility with respect to contract law:

> Alternatively, the law of contracts provides the defense of impossibility. As Professor Jaeger explains, "The tendency of the law is clearly and definitely toward an enlargement of the defense of impossibility, and in any case where it may fairly be said that both

> parties assumed that the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance because of a change in this condition of affairs will ultimately be held an excuse." (18 W. Jaeger, Williston on Contracts § 1952, at 109-12 (3d ed. 1978). Illinois courts have recognized this principle.

Id., 269 Ill. App. 3d at 398, 645 N.E.2d at 1389.

The District Court or the Court of Appeals should have reversed the Bankruptcy Court on the basis that the Appellee's denial of access to the McCook Landfill prevented RTC's estate from performing under the Agreement--and prevented the Petitioner from assisting with repairs, which it had a good faith interest in doing as assignee-in-waiting under the Agreement. The Trust submits that, under the applicable standard, this Court has a basis to reverse and remand for a new trial on the advance royalty provision and the lack of access to the McCook Landfill.

CONCLUSION

For the reasons given above, the Petitioner requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3993

ILLINOIS INVESTMENT TRUST No. 92-7163,

Appellant,

v.

AMERICAN GRADING CO.,

Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 07 C 3268-**Matthew F. Kennelly**, *Judge.*

ARGUED SEPTEMBER 17, 2008
DECIDED APRIL 8, 2009

Before MANION, WOOD, and WILLIAMS, *Circuit Judges.*

WOOD, *Circuit Judge.* Illinois Investment Trust No. 927163 ("Illinois Investment") would like to secure the rights to operate a methane gas collection and conversion system at the McCook landfill, in Lyons, Illinois. Thus far, however, its efforts have been thwarted, because the company from which it wants to acquire those rights, Resource Technology Corporation *("RTC")* is in bankruptcy, and both the bankruptcy court and the

district court ruled that RTC failed to preserve its rights to the system. An earlier agreement between RTC and American Grading Company, the owner of the landfill, had terminated, and thus there were no rights left for RTC's trustee to pass along to Illinois Investment. On appeal, Illinois Investment has explained why it believes that the lease between RTC and American Grading was not terminated and thus why the trustee may still assume the lease and assign it to Illinois Investment. We conclude, however, that the district court correctly assessed the situation, both on the facts and on the law, and we therefore affirm its judgment.

I

A brief summary of the sequence of events places the issues in context. As of the mid-1990s, RTC was in the business of collecting methane gas emitted from garbage landfills and converting that gas into usable electric energy. American Grading owned the McCook landfill. On December 27, 1995, RTC and American Grading entered into a lease agreement for the McCook facility, under which RTC was to install and operate a collection and conversion system there, in exchange for royalties to be paid to American Grading. The lease had an initial term of 10 years, and thus was due to expire on December 27, 2005. RTC could extend its term for up to three consecutive periods of five years each by providing written notice of its intent to renew at least 90 days before the expiration of the preceding period.

The royalties under the lease were based on the sale of electrical energy produced by the conversion system. In addition, however, RTC was required to pay American Grading a $100,000 advance royalty payment on January 1, 1996, and each January thereafter for the life of the lease. Finally, the lease contained a termination clause that read in part as follows:

> TERMINATION. If either party or its assigns defaults or persistently fails or neglects to perform any duty or obligations [*sic*] under this Lease, the other party may terminate the Lease by giving written notice of its intention to terminate. If the responsible party fails to correct the default within thirty (30) days after being given notice, the other party may without prejudice to any other remedy, terminate the Lease.

Lease ¶ 16. The termination clause also mentioned "the commencement by the Lessee [RTC] ... of a voluntary case under the Federal Bankruptcy *Laws*" as a condition of default.

On November 15, 1999, RTC's creditors filed an involuntary petition for bankruptcy relief under Chapter 7 of the Bankruptcy Code. Shortly thereafter, on January 18, 2000, the court converted the case to a Chapter 11 proceeding, with RTC's consent. The case proceeded under Chapter 11 for several years. In 2002, the Illinois Environmental Protection Agency *(IEPA")* issued an operating permit to RTC for the planned gas collection and control system at McCook. See 415 ILCS 5/9, 5/21.

That permit could not be transferred or assigned without IEPA's approval. As far as this record shows, despite the issuance of the permit, RTC was doing little or no business at the site.

In light of the lack of progress in turning around RTC's fortunes, on September 21, 2005, the bankruptcy court converted its case back into a Chapter 7 proceeding and appointed a trustee, Jay A. Steinberg, for the estate. On March 16, 2006, the trustee entered into a settlement agreement with some of RTC's creditors, including a group called the Greenblatt Entities, under which the Greenblatt Entities were given the right to designate executory contracts held by RTC that the trustee would be required to assume and then assign to them. (At a later time, the Greenblatt Entities, with the court's permission, assigned their rights under the settlement agreement to Illinois Investment for the sake of simplicity, we will refer only to Illinois Investment from this point onward.) If the trustee refused to seek the bankruptcy court's approval to assume and assign a contract designated by Illinois Investment, then Illinois Investment had the right to ask the court to compel the trustee to act.

In the meantime, there were some pertinent developments at the McCook site. In December 2005, the trustee sought to obtain access to the site, but he was unsuccessful, because the locks had been changed. On January 1, 2006, RTC's annual advance royalty payment of $100,000 became due, but the trustee did not pay it. A few days later, on January 5, the trustee received the keys to the landfill site. By that time, he had obtained several extensions of

the lease from American Grading, but the final extension expired on January 5. Having received no further requests for an extension, American Grading sent the trustee an email on January 19 requesting him to return the keys to the McCook landfill and to refrain from entering the premises. Although the trustee never returned the keys, he also never entered the site after that date. Approximately six weeks later, he entered into the settlement agreement described above. At that point, the trustee abandoned RTC's state operating permit, laid off all the employees and ceased all operations that had related to the McCook landfill.

Illinois Investment, however, was not ready to give up on McCook. On July 7, 2006, at its behest, the trustee filed a motion for entry of an order compelling RTC's estate to assume the lease (among other agreements). American Grading objected on the ground that the lease had expired according to its terms no later than January 5, 2006. The bankruptcy court scheduled a hearing for November 21, 2006, but American Grading failed to appear, because its counsel had withdrawn shortly before the hearing date. At that time, the court ruled that the term of the McCook lease had been extended for a period of five years from December 27, 2005, to December 27, 2010. It stipulated, however, that the estate's right to assume and assign its rights under the lease (and thus the rights of Illinois Investment, as the creditor's assignee) would be subject to further order of the court with respect to "the curing of defaults, if any, and the provision of adequate assurance of future performance..."

After that, American Grading sent two more notices of default with respect to the lease to the trustee, one on December 29, 2006, and the second on January 12, 2007. It allowed thirty days to elapse after the December 29 notice, and then on January 31, 2007, it issued a notice of termination of the lease and sent that to the trustee. On February 8, 2007, the bankruptcy court entered an order setting a date for a trial on the question whether the lease had been terminated. In a handwritten note at the bottom of that order, someone added the following: "The petitioner shall continue the status quo as of December 28, 2006, without prejudice to ABC's right to raise issues set forth in its notice of 12/29/06." The trial took place on April 4, 5, and 6, 2007. At the conclusion of that trial, the bankruptcy court summarized its finding:

> [I]t is apparent to me that as of January 1 prior to the dispute arising regarding the extension of the agreement---- since at that point the time for extension, was still outstanding-the lessee, RTC, had an obligation to make a hundred thousand dollar advance royalty payment reduced by whatever amount of royalties had not been earned by American Grading in the preceding year.
>
> That would be information that was in RTC's control and would have enabled RTC to make a somewhat less than $100,000 payment on January 1 of 2006 to the extent it could show that there was an overpayment of royalties for the preceding year.

> RTC did not make that payment. And upon demand by American Grading issued on December 29, 2006, failed to make that payment within the subsequent 30 days. That failure gave rise to termination of the contract pursuant to the terms of the lease and the notice that was issued by American Grading.
>
> Now there are a number of other potential grounds for termination that in light of this one I will not have to reach...The question of the advance royalty, as I say, is a very clear one....
>
> The determination of the Court then will be that this contract was validly terminated by American Grading and, therefore, is not capable of being assigned by the estate to [Illinois Investment].

On April 17, the bankruptcy court supplemented this finding with a ruling that American Grading had not prevented RTC from entering the premises of the McCook landfill.

On appeal to the district court, Illinois Investment raised four issues: (1) it was error to characterize RTC's failure to make the $100,000 advance royalty payment as a material breach; (2) the court should have found that American Grading had prevented RTC from entering the landfill and performing under the agreement; (3) the court erred in refusing to allow Illinois Investment to withdraw some exhibits from its exhibit list; and (4) the court misinterpreted its own order of February 8, 2007,

setting the matter for trial. Overall, Illinois Investment argued that the bankruptcy court erred when it ruled that American Grading's termination of the lease was effective. The district court rejected each of these points and affirmed the bankruptcy court.

II

Before this court, Illinois Investment has abandoned its third argument and rephrased its other arguments as follows: first, nonpayment of the advance royalty did not provide a basis for termination, because it was not a material breach; second, American Grading, by focusing on the estate's nonperformance of the agreement after March 26, 2006 (the date when the trustee abandoned the IEPA operating permit), forfeited any argument based on the nonpayment of royalties in January 2006; third, American Grading prevented RTC from performing under the lease, and thus RTC's nonperformance was excused; and finally, the bankruptcy court erred in its interpretation of the February 8, 2007, order as something permitting American Grading to rely on events occurring after December 28, 2006, to support a finding of termination. We look first at the issues surrounding the advance royalty payment, and then we consider briefly Illinois Investment's arguments about excuse and the scope of the bankruptcy court's February 8 order.

A

We begin with the question whether the court was entitled to consider the nonpayment of royalties at all, given the fact that the estate did not abandon the permit until March 26, 2006, several months after the royalties were due, and American Grading had filed a motion *in limine* arguing that RTC's abandonment of the lease at the latter time was the "sole" basis for termination. Both the bankruptcy and the district courts found that the nonpayment of the advance royalty was an ongoing violation of the lease, and thus that American Grading was entitled to raise it as a ground for termination even after the statement it made in the motion. We agree with that reasoning. We would have a different question if the trustee had tendered the $100,000 some time between January 5 and March 26, and then American Grading had still insisted that the lease had ended because RTC abandoned its permit. But that tender never happened, and so the debt remained outstanding at all relevant times.

This takes us to the next issue: was the trustee's failure to pay the advance royalty a material breach that justified American Grading's invocation of the termination provisions of the lease? Illinois Investment argues that the nonpayment was no more than a technicality, because no royalties were ever generated during 2006. Neither the bankruptcy nor the district court was persuaded by this effort, nor are we. There is nothing in the lease to suggest that the advance royalty payment is excused if there are *no* royalties. All the lease says is that the amount due would be $100,000 unless RTC

could show that a lesser amount (down to nothing) was owed because of an unapplied balance from the prior year's advance royalty payment that could be credited against the current year's obligation. In other words, as American Grading points out, the lease required RTC to replenish the advance royalty payment each January 1 so that at the start of each year American Grading had $100,000 in hand to secure RTC's performance. It would then be able to offset royalties that RTC owed it against that amount, as the year unfolded. In essence, the advance royalty obligation functioned as a form of security for American Grading. A breach of the requirement to keep that security in place was thus material and entitled American Grading to set in motion the termination provisions of the lease.

B

Even if the breach were material in the abstract, Illinois Investment argues, it should not have led to a finding that the lease was terminated, because its nonperformance was excused. American Grading did not allow RTC (through the trustee) onto the premises of the McCook landfill starting in December 2005, and thus RTC had no opportunity to perform the contract. This is essentially an impossibility argument: American Grading cannot argue breach when its own conduct made RTC's performance impossible.

The facts surrounding the trustee's access to the site are somewhat confused. The bankruptcy court found that American Grading did not entirely prevent the trustee from entering, because American

Grading's initial refusal in December 2005 was premised on its belief that the lease had not been renewed. After that issue was settled against American Grading (when it failed to appear at the court's November 21, 2006, hearing), there was no additional evidence indicating that American Grading had prevented the trustee from going onto the landfill. The record showed only that the trustee received keys to the McCook site on January 5, 2006, and that he never responded to American Grading's request of January 19th that he return the keys. Then, on March 16, 2006, he abandoned the operating permit, laid off all employees and terminated the operations related to McCook. The district court thought that the trustee could have gone to the bankruptcy court at some point after American Grading demanded the return of the keys and obtained an order requiring American Grading to permit him to enter. Some of these facts suggest that American Grading was responsible for RTC's lack of access; others suggest that RTC's trustee could have done more.

We need not resolve this point, because RTC's failure to pay *advance* royalties was independent of whatever work RTC may have done later in the year that would have generated current royalties. We thus find that the dispute over access is not material to the resolution of this case.

C

Last, we come to Illinois Investment's rather odd argument that the bankruptcy court misinterpreted its own order of February 8, 2007. As

we noted earlier, that order set a date for trial on the issue of termination, and also, through a handwritten note, required the parties to maintain "the status quo as of December 28, 2006 without prejudice to AGC's right to raise issues set forth in its notice sent 12/29/06." Two possible interpretations of this language have been offered: (1) it preserves the parties' legal rights on the question of termination; or (2) it prevents American Grading from raising arguments about termination because its notice of termination (but not its notice of default) came after December 28, 2006. The bankruptcy court chose the first of these interpretations; Illinois Investment urges us to find that only the second made any sense.

We cannot accept Illinois Investment's position. First, as the district court also observed, "a court that has issued an order is in the best position to interpret it." Second, the court was about to hold a trial on the question whether the lease had come to an end. It is far more logical to interpret the order as one that preserved the status quo until that trial could be completed than as one that narrowed the issues so dramatically.

III

We recognize that the practical result of a finding that the lease between American Grading and RTC with respect to the McCook landfill was terminated means that it is not available for any of RTC's creditors. The trustee cannot assume a nonexistent agreement, and thus Illinois Investment (the successor to some creditors) will not be able to

obtain the lease by assignment. Illinois Investment's desire to get some value out of the bankruptcy estate, however, cannot trump the ordinary rules of contract. We AFFIRM the judgment of the district court.

4-8-09

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge:	Matthew F. Kennelly
Sitting Judge if Other than Assigned Judge	
Case Number:	07 C 3268
Date:	11/19/2007
Case Title:	IL Investment Trust vs. American Grading Co.

Docket Entry Text:

For the reasons set forth in the Memorandum Opinion, the Clerk is directed to enter judgment affirming the decision of the bankruptcy court.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ILLINOIS INVESTMENT TRUST NO. 92-7163,	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. 07 C 3268**
	)	
AMERICAN GRADING COMPANY,	)	
	)	
	)	
Appellee.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

After a trial, Chief Bankruptcy Judge Eugene Wedoff denied a motion filed by Jay A. Steinberg, bankruptcy trustee of Resource Technology Corporation ("RTC"), to assume an agreement between RTC and American Grading Company and assign the agreement to Illinois Investment Trust ("IIT"). IIT has appealed from Judge Wedoffs order. For the reasons stated below, the Court affirms the bankruptcy court's decision.

Background

Before it was put into involuntary bankruptcy, RTC was in the business of collecting methane gas

emitted from garbage landfills and converting it into usable energy. On December 27, 1995, RTC and American Grading entered into an agreement ("the Agreement") pursuant to which RTC installed and operated a gas collection and conversion facility on a landfill owned by American Grading in Lyons, Illinois (the "McCook landfill"). The Agreement had an initial term of ten years, to expire on December 27, 2005. The Agreement provided that RTC could extend its term for up to three consecutive periods of five years by providing written notice of its intent to renew at least ninety days before the expiration of the preceding period.

In return, RTC agreed to pay American Grading royalties from the sale of electrical energy. RTC was required to pay American Grading a $100,000 advance royalty payment on January 1, 1996 "and each January 1 thereafter during the life of the contract." Agreement ¶2. The Agreement also imposed other obligations on RTC. Finally, the Agreement contained a termination clause that stated:

> TERMINATION. If either party or its assigns defaults of persistently fails or neglects to perform any duty or obligation under this Lease, the other party may terminate the Lease by giving written notice of its intention to terminate. If the responsible party fails to correct the default within thirty (30) days after being given notice, the other party may without prejudice to any other remedy, terminate the Lease.

Agreement ¶16.

RTC was put into involuntary Chapter 7 bankruptcy in November 1999 and later converted the case to a Chapter 11 reorganization. RTC assumed the American Grading Agreement in July 2002. In September 2005, RTC's bankruptcy case was reconverted to a Chapter 7 liquidation, and a trustee was appointed.

In March 2006, the trustee and IIT entered into a settlement agreement under which IIT would be assigned the McCook landfill lease. The settlement agreement allowed IIT to designate executory contracts that the trustee would be required to assume and then assign to IIT. If the trustee refused to seek the bankruptcy court's approval to assume and assign a contract designated by IIT, IIT had the right to ask the court to compel the trustee to act.

On July 7, 2006, IIT moved the bankruptcy court to compel the trustee to assume the American Grading agreement. American Grading filed initial objections, contending that the lease had expired on January 1, 2006. On November 21, 2006, the bankruptcy court ruled that lease had been extended "by default."

On December 22, 2006, American Grading filed a motion for relief from the automatic stay, asking to send the trustee a notice of default, based on, among other things, RTC's failure to pay its $100,000 advance royalty payment on January 1, 2006. The bankruptcy court granted the motion, and

on December 29, 2006, American Grading sent the trustee a notice of default. The trustee failed to cure the stated defaults within the allotted thirty day period, and on January 31, 2007, American Grading sent the trustee a notice of termination.

IIT, the intended assignee of the Agreement, disputed American Grading's termination claim. American Grading requested a trial date to resolve the dispute, and on February 8, 2007, the court set the case for trial on April 4, 2007. On April 6, 2007, following the conclusion of the trial, the bankruptcy court ruled that the Agreement had been terminated because of the trustee's failure to pay the $100,000 advance royalty payment and his subsequent failure to cure the default within thirty days of receipt of the notice of default. On April 17, 2007, the court issued a supplemental ruling with additional findings of fact, including a finding that American Grading had not prohibited the trustee from gaining access to the McCook landfill, as IIT had claimed.

Discussion

The Court reviews the bankruptcy judge's conclusions of law *de novo* but reviews his factual findings for clear error. *In re Sheridan,* 57 F.3d 627, 633 (7th Cir. 1989). "The clearly erroneous standard ... does not permit a trier of fact to be overturned simply because [the appellate court] is convinced it would have decided the case differently." *In re Bonnett, 895* F.2d 1155, 1157 (7th Cir. 1989) (quoting *Anderson* v. *City of Bessemer City,* 470 U.S. 564, 573 (1985)). Rather, if "two permissible conclusions can be drawn, the factfinder's choice

cannot be clearly erroneous." *Id.* The bankruptcy court's interpretation of its own orders may not be reversed absent a clear abuse of discretion. *Endois Corp.* v. *Employers Ins. of Wausau (In re Consolidated Indus. Corp.),* 360 F.3d 712, 716 (7th Cir. 2004).

IIT identifies four issues that it contends require the reversal of the bankruptcy court's decision. First, IIT argues that RTC's failure to make the $100,000 advance royalty payment to American Grading was not a material breach of the Agreement. Second, it argues the bankruptcy court erred in failing to find that American Grading had prevented RTC from entering the landfill and performing under the Agreement. Third, IIT contends that the bankruptcy court erred in refusing to allow IIT to withdraw exhibits from its exhibit list prior to their tender to the court or admission into evidence. Finally, it argues that the bankruptcy court misinterpreted its February 8, 2007 order setting the matter for trial and erroneously rendered effective American Grading's notice of termination of the lease.

1. **Nonpayment of advance royalty**

IIT argues that the bankruptcy court erred in determining that the nonpayment of the $100,000 advance royalty justified the termination of the Agreement. IIT makes two principal arguments. First, IIT argues that the non-payment was not a material breach of the Agreement. It contends that the breach was technical, reasoning that because no royalties were ultimately due during the 2006

period, payment of the 2006 advance royalty was "pointless" and "not a type of breach that, if anticipated, would have prevented the Agreement from coming into existence." *See* IIT Brief at 8.[1] Second, IIT argues that based on statements it made in a motion *in limine* filed before trial, American Grading should not have been allowed to premise its argument for termination on nonpayment of the advance royalty. *See id.* at 9.

The bankruptcy court did not err in finding RTC's breach material. The Agreement specifically called for $100,000 to be paid on January 1 of each year. That payment was the principal form of consideration due from RTC under the Agreement, and failure to make the payment properly was grounds for termination. When RTC assumed the lease in July 2002, it expressly reiterated this advance royalty payment requirement. *See* Order Authorizing Debtor's Assumption of its Executory Landfill Gas Collection and Conversion Agreement with American Grading Company (IIT Ex. A).

IIT contends that although nonpayment of the advance royalty might, under some circumstances, amount to a material breach, this was not the case in 2006: RTC ultimately sold no gas that year, American Grading thus earned no royalties, and the nonpayment of the advance royalty was of no

---

[1] American Grading asserts that IIT forfeited its materiality argument by failing to assert it at trial. The Court rejects American Grading's contention. Though it does not appear that the terms "material breach" and "technical breach" were used at trial, the matters addressed clearly included the significance of the advance royalty payment.

significance. This misunderstands the way the advance royalty payment was structured under the Agreement; its payment was not excused unless the royalties that had come due *during the preceding year* were under $100,000. As Judge Wedoff stated:

> There is a new hundred thousand dollars [due] every year unless RTC can show that the royalties that came due during the preceding year did not equal or exceed a hundred thousand dollars.
>
> RTC doesn't have a right not to pay a hundred thousand dollars unless it shows that the royalties for the preceding year were less than $100,000. To that extent, it can reduce its hundred thousand dollar payment by the amount of the deficiency in royalties of the prior year.
>
> But if RTC doesn't show that, it has the obligation to make the hundred thousand dollar payment.

Apr. 6, 2007 Tr. at 110.

IIT presented no evidence regarding how much, if at all, the royalties payable for 2005 were less than $100,000. Thus there is no basis to conclude that the nonpayment of the advance royalty was immaterial.

Further, once RTC received the notice of default, it had thirty days under the Agreement to cure the default by paying the $100,000 advance

royalty. Upon receiving the notice of default, RTC could have taken any number of steps to contest the claim of default, including engaging in communication with American Grading. Instead, RTC did nothing. *See* Apr. 6, 2007 Tr. at 191.

Finally, IIT contends that American Grading's reliance on the non-payment of the advance royalty should be disallowed as a basis for termination because of statements American Grading made in a pretrial motion *in limine* it filed about a week before the trial. *See* IIT Brief at 9. In that motion, American Grading said that its termination argument was based solely upon. RTC's non-performance following March 26, 2006, the date that RTC abandoned its operating permit. For this reason, American Grading sought to bar evidence that it had barred RTC's employees from accessing the McCook landfill prior to March 26, 2006. The bankruptcy court denied the motion, ruling that it presented factual and legal arguments not properly decided on a motion *in limine*. *See* Apr. 4, 2007 Tr. at 16.

IIT argues that because American Grading said in the motion *in limine* that March 26, 2006 was the date on which the breach began, it should not have been permitted to argue that nonpayment of the advance royalty due on January 1, 2006 constituted grounds for terminating the Agreement. The Court disagrees. As indicated in its notice of default of December 29, 2006, American Grading considered the nonpayment to be a continuing breach of the Agreement, not a breach that began and ended on one day. The bankruptcy court did not

err in allowing American Grading to base its termination claim on the nonpayment of the advance royalty.

2. Prevention of trustee's performance

IIT contends that American Grading prevented RTC from performing under the lease beginning in December 2005 and that this excused any non-performance by RTC. IIT argues that American Grading's "denial of access for ten months rendered it impossible for RTC to cure the defaults asserted in the Notice of Default." *See* IIT Brief at 10. It contends that the bankruptcy court erred in finding that American Grading had not denied the trustee access to the landfill following the court's November 2006 ruling affirming the extension of the lease.

The Court disagrees. First, physical access to the McCook landfill had no impact on the trustee's failure to pay the $100,000 advance royalty payment, either before or after receipt of the notice of default. Second, the trustee's testimony at trial undermines any claim that American Grading prevented RTC from access to the McCook landfill. Specifically, the trustee stated that he could have gained access to the landfill, even during the ten month period when American Grading believed the Agreement had expired:

> THE COURT: That's my point. That - any statement by Mr. Munitz, whether an email or otherwise, would not have stopped you from getting a court order allowing you to do

> whatever activity [at the McCook landfill] you wanted?
>
> TRUSTEE: Correct. Correct.

Apr. 4, 2007 Tr. at 219.

> THE COURT: I just wanted to get that question answered. You had on other occasions obtained court orders to allow you to take action you thought was appropriate?
>
> TRUSTEE: Oh, yes. Yes.

Id. at 220.

Lastly, the court found no evidence that American Grading had any impact on the trustee's access to the property after the Agreement was found to have been renewed in November 2006. *See* Apr. 17, 2007 Suppl. Order. The trustee conceded in June 14, 2006 court proceedings that, "under no conditions is the estate doing anything there [at the McCook landfill]. We've ceased all operations." Since December 2005, the trustee had not been on the premises and had no intention of being on the premises. In addition, and contrary to IIT's assertions, the trustee did not authorize any activity on behalf of the estate at the McCook landfill. As the trustee testified at trial:

> Q: Once you abandoned the operating permit for the McCook facility [on March 26, 2006], did you have any intention of operating the collection—collection and conversion system?

> A: No.... The estate terminated all its employees at about the same point in time.

Apr. 4, 2007 Tr. at 174.

> A: Upon the abandonment, the estate abandoned the permits, terminated its employees, and had no relationship to operation of the [site].

Id. at 175.

> THE COURT: I think it is very clear from Mr. Steinberg's testimony that he authorized no activity on behalf of the estate at the McCook site from this March date when he terminated all of the employees--
>
> TRUSTEE: Right.
>
> THE COURT: through the present time.
>
> TRUSTEE: Correct, Your Honor.

Id. at 176.

The bankruptcy court's ruling that American Grading did not prevent RTC from performing under the lease thus was not clearly erroneous.

3. American Grading's use of IIT's exhibits

IIT contends that the bankruptcy court erred in refusing to allow IIT to withdraw certain exhibits that it had previously proffered and that American

Grading later introduced into evidence at trial. The admission of these exhibits was not an abuse of the bankruptcy court's discretion. In its amended trial exhibit and witness list, American Grading expressly reserved its right to "use any and all exhibits identified on the exhibit lists filed by [IIT] and the Chapter 7 Trustee." *See* IIT Ex. M. Under the circumstances, American Grading's use of the exhibits at trial did not amount to unfair surprise, nor did it unfairly prejudice IIT.

4. Bankruptcy court's interpretation of February 8, 2007 order

Finally, IIT argues that the bankruptcy court misinterpreted its February 8, 2007 order regarding the subject of the April 2007 trial. In that order, the court set a trial date of April 4, 2007 to resolve the termination issue and stated that "[t]he parties shall continue the status quo as of December 28, 2006 without prejudice to [American Grading's] right to raise issues set forth in its notice sent 12/29/06." *See* Feb. 8, 2007 Order.

IIT contends that this provision barred American Grading from contending that the Agreement could be terminated by any action taken after December 28, 2006. Because American Grading had not taken steps to terminate the Agreement by that date, IIT contends, termination should not have been an issue at trial. IIT argues the February 8 order essentially limited the issues for trial to determination of whether any defaults existed so that IIT could be permitted to cure any such defaults. *See* IIT Brief at 15-16.

Judge Wedoff rejected IIT's argument. As he stated,

> the discussion on record, as reflected in the transcript of February 8, indicates the court's agreement with the position taken in the motion; that there was - and I am reading from page three of the transcript, a question of whether quote, "There are grounds for terminating the contract separate from the contract extension question, separate from its termination by its terms, a question that's still outstanding and that can be addressed."... Nothing in the rest of the transcript indicates any determination by the court to eliminate the question of termination by virtue of an uncured default from the issues that would be set for trial. To the contrary, it is made very clear that the issue would be addressed at trial. To say that the counterparty to an assumed contract could not take action to enforce its rights under the contract would be very peculiar...

Apr. 4, 2007 Tr. at 63, 77-80.

A court's interpretation of its own order is not subject to reversal absent a clear abuse of discretion, *Endois Corp.*, 360 F.3d at 716; a court that has issued an order is in the best position to interpret it. The Court concludes that Judge Wedoff's interpretation of his order was not an abuse of discretion. Reading the February 8 order as IIT suggests makes no sense; the bankruptcy court would not have scheduled a trial concerning the

validity of the termination if it intended to address only the issue of cure. Had the court found the termination improper, presumably it then would have addressed the question of cure costs. But the first step in any such analysis was the issue of termination.

Conclusion

For the reasons stated above, the Clerk is directed to enter judgment affirming the decision of the bankruptcy court.

/s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: November 19, 2007

United States District Court
Northern District of Illinois
Eastern Division

IL Investment Trust

JUDGMENT IN A CIVIL CASE

v.

Case Number: 07 C 3268

American Grading

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered affirming the decision of the Bankruptcy Court.

Michael W. Dobbins,
Clerk of Court

/s/ Olga Rouse, Deputy Clerk

Date: 11/19/2007

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	) CHAPTER 11 Proceeding
	)
RESOURCE	)
TECHNOLOGY	)
CORPORATION	) Case No. 99-35434
	)
Debtor	) Hon. Eugene R. Wedoff
	)

ORDER REGARDING McCOOK LEASE

This matter having come before the Court on Motion of the Chapter 7 Trustee pursuant to this Court's Order Compelling Trustee to Assume and Assign Certain Executory Contracts Subject to Court Approval of (1) Demonstration by the Purchasers of the Ability to Pay Cure Costs; (2) Demonstration by the Purchasers of Adequate Assurance of Future Performance; (3) Assumption; and (4) Assignment (the "Motion") (Docket No. 3478), as such Motion related to the December 27, 1995 Lease (the "McCook Lease") to which Resource Technology Corporation (the "Debtor") and American Grading Company ("AGC") are parties; due notice of the Motion having been given to all parties entitled thereto, and the Court having conducted an evidentiary hearing on certain limited issues relevant to the Motion on April 4-6, 2007 (the "Trial"); the Court having reviewed and considered the pleadings filed in connection with the Motion and the Trial, as well as the evidence and argument

presented by the parties at the Trial, and upon such consideration,

IT IS HEREBY ORDERED that as to the issue of whether the McCook Lease terminated by reason of an uncured default, for the reasons stated on the record at the Trial, the Court finds that the Lease did so terminate; and it is further

ORDERED that the Estate may not assign any right under the McCook Lease, and hence that the motion with respect to the McCook Lease is denied.

Dated: 4/17/07 ENTERED:

/s/ Eugene R. Wedoff
Hon. Eugene R. Wedoff

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	**) Chapter 11**
	)
RESOURCE	**) Case No. 99 B 35434**
TECHNOLOGY	**)**
CORPORATION,	**) Hon. Eugene R. Wedoff**
Debtor(s).	**)**

ORDER AUTHORIZING DEBTOR'S ASSUMPTION OF ITS EXECUTORY LANDFILL GAS COLLECTION AND CONVERSION AGREEMENT WITH AMERICAN GRADING COMPANY

THIS MATTER coming to be heard upon the above-referenced debtor's (the "Debtor" or "RTC") Motion ("Motion") for the Entry of an Order Authorizing its Assumption of its Executory Landfill Gas Collection and Conversion Agreement with American Grading Company dated December 27, 1995 (the "Agreement"); due notice of the Motion having been given to those parties entitled thereto; American Grading Company ("AGC") having objected to the relief requested in the Motion; the Court having reviewed the various briefs of the Debtor and AGC filed in support of and opposition to the Motion, respectively, and having conducted a full evidentiary hearing on the Motion (the "Hearing"); the Court having (1) ruled on the Motion for the reasons states in the record after the conclusion of the Hearing on May 24, 2002, (2) granted the Motion

subject to the terms and conditions set forth below and (3) specifically found that (a) under Section 2 of the Agreement, on January 1 of each years of the term of the Agreement, RTC is required to pay to AGC the sum of $100,000 as an advance on royalties due to AGC under the Agreement for that particular calendar year (the "Advance Royalty"), provided, however, that (i) if the aggregate amount of the Royalties due AGC under the Agreement for that particular calendar year is less than the Advance Royalty, then the remaining balance of that particular calendar year's Advance Royalty will be carried over and deemed credited to RTC's Advance Royalty payment due for the following calendar year and (ii) any balance on the Advance Royalty remaining as of the completion of the term of the Agreement must be paid to RTC within 30 days of such completion, provided that no other amounts due to AGC under the Agreement are unpaid, (b) under Section 8(d) of the Agreement, RTC is responsible for 100% of the real property taxes assessed against the Premises (as defined in the Agreement) during the term of the Agreement, (c) RTC is not responsible to pay for or reimburse AGC for any security costs under the terms of the Agreement and (d) subject to the conditions set forth in this order, RTC has met its necessary burden under Section 365 of the Bankruptcy Code for its assumption of the Agreement; and the Court having jurisdiction over this core proceeding and otherwise being fully advised in the premises.

IT IS HEREBY ORDERED THAT:

A. The Motion is granted.

B. The Debtor is hereby authorized to assume the Agreement, subject to the conditions set forth below:

1. Pursuant to Section 365(b) of the Bankruptcy Code, the Debtor shall pay to AGC, in ten monthly installments, with the first installment of $39,418.55 to be paid on June 24, 2002[1] and each remaining installment to be paid on the 24th day of each of the next nine successive months, or if said day is a not a business day, then on the next business day, in the amount of $40,202.82 (which monthly amount includes interest at the rate of 4.75% per annum based upon a 360-day year) which aggregate amount will hereinafter be referred to as the "Cure Amount" the principal of which is comprised of the following:

A.	Royalties Owed as of December 31, 2001	$165,963.47
B.	Balance Due on 2002 Royalty Advance	$86,208.46

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[1] This payment will be due on or before July 8, 2002 and will not be subject to a late payment fee if paid by such date.

C. Past Due Leachate Removal Costs[2] $20,720.00

D. Past Due Utility Costs $2,224.34

E. Past Due Property Taxes[3] $116,869.27

F. Equipment Rental Charges $2,200.00

2. The installment payments of the Cure Amount shall be made by wire transfer as follows: Founders Bank, 6825 West 111th Street, Worth, Illinois 60482. Routing # 071923213, Acct. # 05043062, Acct. Name: American Grading Company.

3. RTC is prohibited from taking any action that will reduce the level of power generated from its conversion facility located at the AGC landfill prior to the time that the Cure Amount is paid in full.

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[2] Payments due for Leachate Removal after April, 2002 are not included in the Cure Amount and will come due and be paid in the ordinary course of the parties' business.

[3] Reflecting taxes owed by RTC prior to June 1, 2002 for calendar years 1996 through 2000, and first installment 2001 real estate taxes.

4. Commensurate with the entry of this Order, an agreed order in the form attached hereto amending Paragraph 18(d) of the Stipulation and Agreed Final Order Authorizing Postpetition Financing, Granting Senior Liens and Priority Administrative Expense Status, Providing for Adequate Protection, Modifying the Automatic Stay and Granting Related Relief dated March 2, 2000, or any amendments thereto or commensurate orders (the "March 2, 2000 Order") will be entered, which amendment causes Leon Greenblatt, for himself and as agent for Banco Panamericano, Inc. and Chiplease, Inc. (collectively, "Secured Creditor"), to subordinate its right to payment of principal, interest and costs under the Postpetition Loan Documents (as defined in the March 2, 2002 Order) to, among other things as originally provided for in the March 2, 2000 Order, the payment to AGC of the Cure Amount; and

5. If an installment payment of the Cure Amount is not made on the date due, then AGC, upon five business days written notice (the "Notice Period") by personal service or facsimile to RTC and its counsel, Shaw Guesis Fishman Glantz & Wolfson, LLC, 1144 West Fulton Street, Suite 200, Chicago, Illinois, 60601, Fax: (312) 541-0151 and Creditors' Committee counsel, William Barrett, Barack, Ferrazzano, Kirschbaum, Perlman & Nagelberg, 333 W. Wacker Drive, Suite 2700, Chicago, Illinois 60606, Fax: (312) 984-3150, may (a) accelerate payment of the unpaid

balance of the Cure Amount and (b) present to the Court for entry an order providing that RTC and the Secured Creditor are required to pay AGC all monies received by RTC or Secured Creditor that are required to be paid to Secured Creditor pursuant to the Postpetition Loan Documents until such time that the Cure Amount, interest thereon, and the reasonable costs, including attorney's fees, of AGC in effecting collection are paid in full or until further order of the Court; provided, however, that the remedies set forth in subsections (a) and (b), above, shall not be effectuated if during the Notice Period, RTC submits the required monthly payment. If a default shall occur and not be cured as set forth above, then interest on the unpaid, accelerated balance of the Cure Amount will accrue at the rate of 6.75% per annum based on a 360 day year.

C. Time is of the essence with respect to the payment provisions provided in this Order.

D. Any previously filed proof of claim filed by AGC in this Case for amounts that were asserted by AGC to be owed to it as part of the cure required to be paid by RTC in conjunction with its assumption of the Agreement under Section 365 of the Bankruptcy Code is hereby deemed satisfied and replaced by the terms of and payments required by this Order, except that in addition thereto, AGC is hereby allowed a general unsecured claim in the sum of $122,829.00.

E. This Court retains jurisdiction to interpret and to enforce the provisions of this Order.

F. Facsimile signatures in counterpart will be sufficient for the entry of this order as well as the order required to be entered under paragraph B 4, above.

Date:_____, 2002

ENTER

/s/ Eugene R. Wedoff

Bankruptcy Judge

9 JUL 2002

APPROVED:

RESOURCE TECHNOLOGY CORP., AMERICAN GRADING COMPANY

Debtor in Possession

By /s/ One of its Attorneys

By /s/ One of its Attorneys

/s/ Leon Greenblatt
Leon Greenblatt, individually, and as agent
for Banco Panamericano, Inc. and Chiplease, Inc.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RESOURCE TECHNOLOGY CORPORATION,	)	No. 99 B 35434
	)	Chicago, Illinois
	)	10:30 a.m.
Debtor.	)	April 17, 2007

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

For Illinois Investment Trust:	Mr. Peter Schmidt;
For John Connolly:	Mr. Thomas Wolford;
For American Grading:	Mr. Phillip Comella; Ms. Sara Lorber;
Court Reporter:	Amy Doolin, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, IL 60604.

THE CLERK: Resource Technology Corporation, 99 B 35434.

MR. SCHMIDT: Good morning, Your Honor. Peter Schmidt on behalf of Illinois Investment Trust.

MR. WOLFORD: Thomas Wolford on behalf of John Connolly and related parties.

MR. COMELLA: Phil Comella for American Grading and Sara Lorber.

THE COURT: I have determined that I needed to supplement the ruling that I made at the conclusion of our hearing. And before I do that, I need to apologize to you for the initial message that you got which may have caused you to scramble to make additional oral argument. That's my fault, a confusion that I had, and I do apologize for any unnecessary work that I made you do.

The fact finding that I made at the conclusion of our hearing focused on one element of uncured default that I believe resulted in the termination of the gas collection agreement that's at issue here. That is an incomplete finding, and it fails to address as specifically as it ought to the argument that was made by the proposed assignee regarding the alleged prevention of access by the trustee to the landfill. So I would like to back up and again supplement the findings that I made at the conclusion of the hearing.

There was, in, fact, as established at the hearing, a statement by American Grading that the trustee would not be allowed access to the landfill,

but that statement was based exclusively on the notion that the landfill agreement, gas rights agreement, had terminated through nonextension and that was a disputed issue.

That issue was ultimately determined on a default basis against American Grading. There is no evidence that American Grading at any point after the court's decision finding that the agreement had been extended indicating that the trustee was forbidden access to the property, none.

Moreover, when American Grading sent its notice of default on December 29, American Grading demanded performance of the trustee under the agreement. American Grading certainly was not at the time that it issued that default notice prohibiting the trustee from entering the premises to perform under the gas rights agreement. To the contrary, the entire impact of the notice of default was to require the trustee to perform under the agreement.

So, again, the critical factor from my point of view is that the only basis American Grading had ever asserted for the trustee not entering into the property was the nonextension of the agreement. The removal of that ground by virtue of the court's order finding that the extension had taken place eliminated any basis for the trustee not entering into the property.

The trustee, it will be remembered, I think I already made this finding, had the key to the lock which would have permitted the trustee to enter the premises. So the rationale given by the proposed

assignee for not performing under the contract when trustee received the notice of default has no factual predicate.

The trustee had the right and the obligation under an extended contract to perform at the time the notice of default was given by American Grading. The failure then to perform not only by failing to deposit the advance royalty that I referred to in my initial findings, but also the failure to operate the gas collection system, comply with the obligations of the Illinois environmental law, are additional grounds for finding that the contract had terminated.

And, again, the rationale given by the proposed assignee for the trustee's nonperformance is invalid. The trustee was not prevented by American Grading from entering into the property and performing under the contract. The 30-day failure to comply with the terms of the contract after the court found that it had been extended indeed gave rise to termination.

So I wanted those additional findings on the record, and at this point I will enter an order finding that the contract may not be assumed and denying the motion to assume for the reasons stated on the record.

Thank you all.

MR. SCHMIDT: Thank you, Your Honor.

MR. COMELLA: Thank you, Judge.

(Which were all the proceedings had in the above-entitled cause, April 17, 2007, 10:30 a.m.)

I, AMY B. DOOLIN, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RESOURCE TECHNOLOGY CORPORATION,	)	No. 99 B 35434
	)	Chicago, Illinois
	)	10:30 a.m.
	)	1:30 p.m.
Debtor.	)	April 5, 2007

VOLUME II

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

For Illinois Investment Trust:	Mr. Gregory Jordan; Mr. Peter Schmidt;
For American Grading:	Mr. Phillip Comella; Ms. Sara Lorber;
Court Reporter:	Amy Doolin, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, IL 60604.

* * *

A In addition to that, it would remove the performance or at least reduce the performance or change the performance requirements of the combustion device.

Q Okay. And I don't know, maybe I missed it. Can you put a dollar figure on that on a monthly or annual basis of the reduction?

A Yeah, it would be in the range of $5,000 a month or 60,000 a year.

Q All right. Thank you very much. Now, speaking of money, now on a go-forward basis, did you have any sense of what the revenues that would be generated from the site would be?

A Sure.

Q What would that be?

A I would estimate the revenues would be between, you know, around 48,000 a month gross to maybe 60,000 a month gross. So that would be the number.

Q How do you come up with those numbers about the 48,00 to about 60,000 a month gross?

A Well, it's based on historical knowledge of the site and the amount of gas that we believe is available, base it on the operation of two engines, Jenbacher engines on the site, and the number of

megawatt hours that would come out of those engines per day. And you multiply it by a rate.

And the reason the rate—the variable is—I assumed either 4 cents a kilowatt hour or 5 cents a kilowatt hour.

Q And what was the amount of megawatts hours that you would expect out of two Jenbacher engines or out of the generator, whatever it is?

A About 40 megawatt hours per day, or 1200 a month.

Q So, it's about 40 kilowatts times 4 cents times—or divided by 365 times 12 would get you a monthly number, is that about how you did it?

A It is—right. It's the 40,000 kilowatts, times 4 cents. That would get you the daily rate. Times 365 would get you the annual revenue.

Q Divided by 12 would get you the monthly?

A That's right.

Q Right. So that's how you get 48—4 cents per kilowatt hour to 60, which would be 5 cents per kilowatt hour?

A That's right.

Q And what would you expect to be—never mind. I will move on.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RESOURCE TECHNOLOGY CORPORATION,	)	No. 99 B 35434
	)	Chicago, Illinois
Debtor.	)	9:30 a.m.
	)	1:30 p.m.
	)	April 4, 2007

VOLUME I

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

For Illinois Investment Trust:	Mr. Gregory Jordan; Mr. Peter Schmidt;
For American Grading:	Mr. Phillip Comella; Ms. Sara Lorber;
For the Trustee:	Mr. Barry Chatz;
For the City and County of Peoria:	Ms. Linda Kujaca;
For Allied:	Mr. Robert O'Meara;
Court Reporter:	Carol Raber, CSR Amy Doolin, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, IL 60604

* * *

THE WITNESS: They were not agents of the estate after March, of the Chapter 7 bankruptcy trustee they were not agents.

BY MS. LORBER:

Q So isn't it true that the estate, the debtor, was not denied access to the McCook site at any point after March of 2006?

A After March—

Q That's a yes or no answer.

A No, that's not correct.

Q Why is that not correct?

A Because in December, in an effort to try to address the problems, it was agreed that they would try to go on the site, and then they changed their minds and said you can't go on the site. They meaning American Grading. I had finished operating. There were problems there.

Q There was agreement with who?

A What?

Q There was an agreement between who?

A We were in court and the judge said try to work it out, try to get the situation resolved.

Q So there was agreement between the estate and American Grading?

A There was agreement between the parties who were in court.

Q I am asking you a question—

A I was answering your question—

THE COURT: Okay. this is argument, and I think you can present your argument, but I don't think you're getting any further factual information out of the witness at this point. You're just arguing with him.

MS. LORBER: But isn't he required to answer—

THE COURT: So you have to go on to another issue at this point.

BY MS. LORBER:

Q Did you have an agreement with American Grading in December of 2006?

A I never had any agreement with American Grading. There was an executory contract.

Q So when you were referring to parties that were in court, were you excluding yourself from that reference to parties?

A Would you repeat that question.

Q Were you one of the parties when you were referring to the parties who were in court?

A Yes.

Q And what was the nature of the agreement that was reached?

A We were attempting to -- we were attempting to have the generators repaired. I believe that is when Run Energy came in. And we were trying to see if we could get them working. The problem was at that point, I believe, American Grading didn't want to let anyone on from RTC, and I was trying, as I often try to do, to broker a deal and try to get it done.

Q Is this in November of 2005 or November of 2006?

A '06.

Q And what matter were—do you recall what matter you were in court on when this came up?

A It was in response to someone's motion. I can't recall whose.

Q And who was trying to get access to the site to fix generators?

A I believe Mr. Connolly and Mr. Fortelka.

Q So that was not you who was trying to get access to the site—

A Not me. Like I said, I was a volunteer to try to assist the parties in getting the site worked on.

Q And again, Mr. Fortelka and Mr. Connolly here about the legal consequences of various actions that were taken. What would be really helpful for me on this question of access is to find out what factually occurred.

So let me try, Mr. Steinberg, if I can get from you something of a chronology regarding the question of access to the McCook site, beginning with your appointment as trustee and continuing thereafter. You were first appointed September of '05, you had unrestrained access to the site?

THE WITNESS: Correct, Your Honor.

THE COURT: When did that situation change, it at all?

THE WITNESS: The first I can think of definite denial of access was the period time we are talking about. That would be December of '05, January '06.

THE COURT: Okay. So there is a period of time from December of '05 to January of '06 when you did not have access to the site, the locks were changed and you didn't have a key, right?

THE WITNESS: Until January 6th or so, yes, Your Honor.

THE COURT: Okay. And then in January of '06 you were given a key?

THE WITNESS: Correct.

THE COURT: Did you retain that key?

THE WITNESS: I gave that key to Mr. Chatz.

THE COURT: To who?

THE WITNESS: Mr. Chatz, my lawyer.

THE COURT: Okay.

THE WITNESS: The estate's lawyer.

THE COURT: Now, as far as you know, did Mr. Chatz retain that key?

THE WITNESS: Oh, yes.

THE COURT: Still has it now?

THE WITNESS: Yes.

THE COURT: Okay. So through Mr. Chatz at any time you wished you could have gotten access to the premises?

THE WITNESS: I would say up through January 19th.

THE COURT: Of '06?

THE WITNESS: '06.

THE COURT: What happened on January 19th?

THE WITNESS: At that point I received an e-mail from Mr. Munitz indicating that the contract was terminated and I should return the keys.

THE COURT: But you didn't?

THE WITNESS: I did not.

THE COURT: So you found out that there was a position being asserted by American Grading but you still had physical access to the site?

THE WITNESS: The keys were in Mr. Chatz's possession. We did not give the keys – we did not use the keys. Mr. Chatz had keys, no question.

THE COURT: But you could have used them if you wanted to?

THE WITNESS: Between January 6th and 16 -- and the 19th, yes. Afterwards I wasn't going to go on the site if Mr. Munitz said I want the keys back, because he gave me the keys.

MS. LORBER: Could I ask one question? Is the witness reading -- using something as an assistance?

THE WITNESS: Yes, I'm looking at Mr. Munitz's e-mail.

MS. LORBER: Well, it's not before you, is it, as an exhibit or anything?

THE COURT: Okay. I am just trying to get the situation straight. From January 6 through

* * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In re:	) Case No. 99 B 35434
	) Chapter 7
RESOURCE	)
TECHNOLOGY	)
CORPORATION,	) Hon. Eugene R. Wedoff
Debtor.	)
	) Hearing Date: April 4, 2007
	) Hearing Time: 9:30 a.m.

AMERICAN GRADING'S THIRD MOTION *IN LIMINE* TO BAR TESTIMONY, EVIDENCE OR ARGUMENT RELATING TO THE PURPORTED DENIAL OF ACCESS TO THE DEBTOR'S FORMER EMPLOYEES

American Grading Company ("American Grading"), through its counsel, moves the Court for entry of an order barring Illinois Investment Trust No. 92-7163 (the "Proposed Assignee") from introducing at trial any testimony, evidence or argument relating to the alleged denial of access to the former employees of the above-captioned debtor (the "Debtor"). In support of this motion, American Grading states as follows:

1. Trial is set in this mater for April 4, 2007, on certain issues relating to the Chapter 7 Trustee's ("Trustee") motion to assign that certain

Lease, dated December 27, 1995 ((the "McCook Agreement" or "Agreement")) to the Proposed Assignee, one of which issues is whether or not the McCook Agreement has been terminated due to uncured defaults by the Debtor and its estate (the "Estate") under the McCook Agreement (the "Termination Issue").

2. One disputed factual issue is whether one or more of the Debtor's former employees was denied access to the McCook facility during the period of time such persons were employed by the Trustee as a result of American Grading's change of the locks at the McCook facility.

3. There is, however, no dispute that all such persons ceased to be employed by the Trustee by no later than March 26, 2006. *See* Deposition of Jay Steinberg ("Steinberg Dep.") at pp. 34-35 (Exhibit A).[1]

4. American Grading believes that the Proposed Assignee may take the position at trial that the alleged denial of access excused the Debtor's further performance under the McCook Agreement and therefore that the Debtor is not in default and the McCook Agreement has not been terminated.

5. Such an argument is wrong as a *matter of law* and any evidence related to the alleged denial of access is irrelevant and should be barred for the reasons set forth below.

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[1] All references to "Exhibit" or "Exhibits" are to the Exhibits in Support of American Grading's Motions *in Limine*, which is being filed concurrently herewith.

6. *First,* American Grading's termination argument is based solely upon the Estate's non-performance following March 26, 2006, the date that the Trustee abandoned the operating permit for the McCook facility. *See* American Grading's First Motion *in Limine.*

7. *Second,* the Trustee admitted that he was provided with copies of the keys to the McCook facility following the lock change and that there was no further interference with the Estate's ability to perform under the McCook Agreement. *See* Steinberg Dep. at pp 35-36, 41-43, 47.

8. *Finally,* even if the Estate's representatives were denied access to the McCook facility prior to March 26, 2006, as a *matter of law,* such denial did not excuse the Estate's further performance under the McCook Agreement because: (i) the Trustee admits that he did not provide American Grading with written notice as required by paragraph 6 of the Agreement *(see* Steinberg Dep. at pp. 51-52); (ii) any alleged interference or default by American Grading was cured when American Grading gave the Trustee the keys to the McCook facility; and (iii) by seeking to assign the McCook Agreement to the Proposed Assignee, the Trustee was legally required to continue performing under the Agreement.

9. Paragraph 6 of the McCook Agreement governs access to the McCook facility and provides, in pertinent part:

> If any party takes any action, refrains from taking any action, or undertakes any change in operations, maintenance or expansion programs or other factors, and thereby materially and detrimentally affects the business operations of the other party at the Premises, ***then if such detrimental event is not cured within thirty (30) days after receipt of written notice describing the nature of the detriment and its cause, the failure to cure such detrimental event within such thirty day period shall be a Termination Event.***

McCook Agreement at ¶ 6 (emphasis added and attached as **Exhibit L**).

10. To the extent the alleged denial of access interfered with the Estate's ability to perform under the McCook Agreement, the Trustee was required to provide American Grading with written notice of such interference. The Trustee testified that the only notice he provided to
American Grading was speaking with counsel for American Grading in the hall after Court. In this regard, the Trustee testified:

> Q. Did you ever provide American Grading with a notice that it was interfering with your ability to perform under the McCook agreement?
>
> A. Verbally. That's all.
>
> Q. And who did you provide that notice to?

A. When we talked to Mr. Munitz in the hallway that's what precipitated I presume these e-mails.

Q. Do you recall what you told him?

A. I told him I was advised the locks were changed and it would be prudent of him to have his client allow RTC people to get on the premises.

Q. Okay. So once you received copies of the keys after that point in time, did you ever notify American Grading that it was interfering with your ability or the estates ability to perform under the McCook agreement?

A. I don't believe so.

Q. Did you believe that it was - that American Grading was interfering with the estate's ability to perform under the McCook agreement following the provision of keys to you?

A. I would assume it didn't continue because I wasn't advised that there was another problem. I have no personal knowledge. If there was, I didn't know about it.

Steinberg Dep. at pp. 51-52.

11. The Trustee's failure to provide American Grading with written notice and an opportunity to cure bars any claim that American Grading breached the agreement by denying access to the Estate's representatives. Where, as here, a default clause contains a notice provision, it must be strictly followed. In other words, when the Trustee failed to employ the express remedy provided in paragraph 6 of the Agreement, i.e., providing written notice, the Estate (as well as the Proposed Assignee) lost the right to assert that American Grading's alleged denial of access was a default under the Agreement. *See, e.g. Canteen Corp.* v. *Former Foods, Inc.*, 238 Ill. App. 3d 167, 183, 606 N.E.2d 174, 184 (1st Dist. 1992) (plaintiff breached a requirements contract with defendant by terminating it without, as the contract required, providing written notice to defendant and a cure period); *see also Magnuson* v. *Schaider*, 183 Ill. App. 3d 344, 538 N.E.2d 1309 (2d Dist. 1989) (explaining that seller would breach contract with buyer if it failed to comply with the contract's notice and opportunity to cure provision); *Columbus Container, Inc.* v. *Logility, Inc.*, No. IP 99-1434-C-T/K, 2002 WL 449790, at *7 (S.D. Ind. Feb. 7, 2002) (barring plaintiffs breach of contract claim as a matter of law where it failed to comply with the contract's notice and cure provision).

12. Further, as the testimony quoted above indicates, the Trustee was provided with keys to the McCook facility, and thus any alleged interference or default by American Grading was cured. *See* Steinberg Dep. at pp. 51-52; *see also* pp. 35-36, 41-43, 47.

13. Finally, the Proposed Assignee's and Trustee's treatment of the McCook Agreement as continuing and subject to assignment prohibits the Proposed Assignee from asserting that the Debtor's performance under the McCook Agreement was excused due to American Grading's alleged denial of access. *See, e.g., South Beloit Elec. Co.* v. *Lar Gar Enter., Inc.*, 80 Ill.App.2d 367, 375, 224 N.E.2d 306, 301-11 (2d Dist. 1967) ("Where a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or refusing to go on. If he chooses to continue performance, he doubtless lost his right to stop performance."); *see also* 14 Williston on Contracts § 43:15 (4th ed.) ("the general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party, with knowledge of the facts, either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render performance.").[2]

WHEREFORE, American Grading respectfully requests that the Court enter an order, substantially in the form filed herewith, (A) barring the Proposed Assignee from introducing at trial any testimony, evidence or argument relating to the alleged denial of access to the Debtor's former

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[2] Equally futile is any argument that the Estate could not perform because it was physically prohibited access to the McCook facility. A number of the alleged defaults (e.g., lack of insurance, failure to post a bond, and appointment of a receiver) were not contingent upon physically accessing the McCook facility.

employees, and (B) granting American Grading such further and additional relief as the Court deems appropriate.

DATED: March 29, 2007

Respectfully submitted,

AMERICAN GRADING COMPANY

By: /s/ Sara E. Lorber
One of its Attorneys

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